IN THE

SUPREME COURT OF THE UNITED STATES.

OZARK PIPE LINE CORPORATION,
Appellant,
v.
ROY MONIER and GEORGE M. HAGEE, Constituting the State Tax Commission of the State of Missouri, and JESSE W. BARRETT, Attorney-General of the State of Missouri,
Appellees.

No. 181

Appeal from the District Court of the United States for the Western District of Missouri.

BRIEF FOR APPELLANT.

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Appellees.
No. 575.

Appeal from the District Court of the United States for the Western District of Missouri.

BRIEF FOR APPELLANT.

STATEMENT.

On May 9, 1922, the appellant filed its complaint in this cause against the appellees, seeking to enjoin the enforcement of the so-called Missouri Franchise Tax Law, so far as it was claimed by the appellees that said law was applicable to the appellant. The ground of the complaint is that the appellant is

doing a strictly interstate business; that it does no intrastate business whatever, and that the State of Missouri therefore cannot levy a franchise tax for the privilege of doing business across the State of Missouri against the appellant.

The appellant is a corporation organized under the laws of the State of Maryland. It operates a pipe line for the purpose of transporting crude petroleum from Cushing, Oklahoma, to Wood River, Illinois. The route of this pipe line is shown in Plaintiff's Exhibit A, inserted at page 26 of the record. The evidence shows that the appellant has a pumping station at Cushing, Oklahoma, another one at Verdi, Oklahoma, and three pumping stations in the State of Missouri, along the line; namely, at Shelton, Roxdale and Yarna. It receives no oil in Missouri for transportation and it makes no deliveries of oil in Missouri; all of the oil received by it is received in Oklahoma and is pumped through the line to Wood River, Illinois.

After its organization in Maryland the company, on January 9, 1920, obtained a license to do business in the State of Missouri under Section 9792 of the Revised Statutes of Missouri of 1919, and paid to the State of Missouri the corporation tax and fees required by that section. The corporation at that time had a capital of $10,400,000.00, and it paid to the State of Missouri corporation taxes and license fees amounting to $2,696.50.

Subsequently the capital of the company was increased to $30,000,000.00, and on August 18, 1921, it paid an additional corporation tax and license fee to the State of Missouri amounting to $3,705.00, and was duly authorized to do business in the state in accordance with the provisions of said section 9792.

The company also pays ad valorem taxes upon physical property, pumping stations and rights of way to the State of Missouri, and taxes upon personal property, such as office fixtures, automobiles, etc.

In addition to the above taxes the State of Missouri has attempted to collect from the appellant a so-called franchise tax under Sections 9836 to 9848, inclusive, of the Revised Statutes of Missouri of 1919. These statutes provide for the payment of an annual franchise tax to the State of Missouri by every corporation organized under the laws of the State and by every corporation not organized under the laws of the state and engaged in business in the state.

It was the contention of the appellant that it was not liable for the payment of this franchise tax for the reason that it does no intrastate business within the State of Missouri. The appellees refused to accede to this contention and were preparing to take steps against the appellant by the issuance of a tax bill, which would become a lien on the property, and had referred the matter to the Prosecuting Attorney of St. Louis for action by him. At that stage of

the proceedings the company got the Commission to postpone action until this suit could be filed (Rec., p. 18).

THE PLEADINGS.

The bill of complaint was filed, as stated, on May 9, 1922 (Rec., p. 1); the complaint sets out in detail the contentions of the appellant in regard to the matters above enumerated; namely, that the company is doing an interstate business only; that it receives no consignments of oil within the State of Missouri and delivers no consignments of oil within the State of Missouri, but transports all consignments of oil through the State of Missouri from Oklahoma to Illinois; that the company complied with the laws of Missouri applicable to foreign corporations, for the reason that it desired to have all the powers of a Missouri corporation, among others, the privilege of eminent domain (Rec., p. 4); that the plaintiff is a common carrier and a public utility, subject to the jurisdiction of the Interstate Commerce Commission; that it transports oil at rates approved by the Interstate Commerce Commission.

The complaint then sets out the provisions of Section 9836 of the Revised Statutes of Missouri 1919 (Rec., p. 5), and subsequent sections, and alleges that the defendant Jesse W. Barrett was threatening to

bring an action to revoke the license of the plaintiff obtained from the State of Missouri on January 9, 1920, and to deprive it of its power of eminent domain, and to cause a tax bill to be issued with a 25 per cent penalty, with interest at the rate of 1 per cent a month, which would become a lien upon the property of the appellant in the State of Missouri. It is then pleaded that the Missouri Franchise Tax Act is unenforceable against the complainant under the Constitution of the United States for the reason that the complainant is doing nothing but an interstate business (Rec., p. 7).

In the defendants' answer (Rec., p. 9) the defendants called upon the complainant for strict proof as to the western terminus of the line at Cushing, Oklahoma, and as to the eastern terminus of the line at Wood River, Illinois, and called for proof that the plaintiff is engaged solely in the business of operating a pipe line and certain gathering lines in the State of Oklahoma, and is engaged solely in the business of conducting crude petroleum through said pipe line from the State of Oklahoma to the State of Illinois and through and across the State of Missouri.

The defendants denied that the plaintiff does no business within the State of Missouri, and averred that it is engaged in business within the state. This denial raises the only real issue in the case. The balance of the answer consists either of admissions

or of calls upon the plaintiff for proof of matters which are neither admitted nor denied, and of denials of matters of law.

The only issue in the case, both on the pleadings and at the trial, was the question whether or not the complainant was engaged in business within the state in such a way as to render it liable to the franchise tax of the state.

The reply was a general denial. [Through an error the record contains, instead of the reply, the reply memorandum for plaintiff (Rec., p. 12). After the case had been taken under advisement the plaintiff filed a memorandum brief. To this brief the defendants answered by a memorandum brief for the defendants, and the plaintiff thereupon filed its reply memorandum. It was not our intention to have any of these briefs set out in the record. The praecipe set out at page 50 calls for the petition, the answer and the reply. With this explanation, we pass by the reply memorandum appearing at page 12 of the record.]

THE EVIDENCE.

The original Articles of Association of the Ozark Pipe Line Corporation were offered in evidence, (Plaintiff's Exhibit D, page 29). These articles show that the corporation, as originally incorporated in

Maryland, was given very broad powers, and these powers are commented upon by the court below in its opinion (page 42).

The original certificate of authority to do business in the State of Missouri, which was obtained by the company on January 9, 1920, was also offered in evidence (Plaintiff's Exhibit C, page 28). This certificate states that the corporation is from the date thereof "duly authorized and licensed to engage in the State of Missouri exclusively in the business of transporting crude petroleum by pipe line," etc. It is thus apparent that whatever the company's general powers under its original charter were, its authority under the certificate and license issued by the State of Missouri, upon which some stress was laid below, was merely and exclusively one to engage in the business of transporting crude petroleum by pipe line.

After this certificate and license had been obtained from the State of Missouri the corporation increased its capital stock and obtained the certificate of such increase from the Secretary of State of Missouri, (Plaintiff's Exhibit B, page 28). This certificate is dated August 18, 1921, and in no way enlarges the certificate and license of January 9, 1920, in so far as the kind of business authorized by such certificate is concerned.

In order to supplement the certificates above described, which had been offered by the plaintiff, the

defendants offered two exhibits, set out at pages 40 and 41. These are affidavits. Exhibit I is dated January 5, 1920, and was made by Mr. T. F. Lydon, principal officer of the company in Missouri on that date. This affidavit was made at the time of obtaining the original certificate and license. It sets out the proportion of its capital stock represented by property in Missouri, to wit: A 10-inch pipe line extending from the Missouri-Oklahoma line to the Mississippi River. It also states that the principal office of the corporation, or place of transaction of its business in Missouri, where legal service may be obtained upon it, is located on the fourteenth floor of the Arcade Building, St. Louis, Missouri.

Defendant's Exhibit 2 is an affidavit of Mr. P. R. Chenoweth, assistant secretary of the company, dated August 17, 1921, which was made at the time of the increase of the capital stock of the company, as shown by Plaintiff's Exhibit B. This affidavit sets out the authorized capital of the company and that the amount of property and business of said corporation in Missouri is $12,720,000.00.

At the present time we desire merely to call the Court's attention to the language of these instruments. We shall comment upon the legal effect thereof in the argument.

There were only two witnesses examined: Mr. Carl Barker, the tax commissioner of the corporation (page

17), and Mr. Robert Bascom, the general manager of the corporation (page 22).

The evidence disclosed the following facts:

The company's business consists of transporting crude petroleum by pipe line. It receives the petroleum at points in the State of Oklahoma and delivers it to Wood River. It receives no shipments of oil in Missouri; it makes no deliveries in Missouri. Approximately fifty per cent (50%) of its property lies within the State of Missouri—that is, pipe lines, rights of way, pumping stations and physical assets.

It is a common carrier. It receives shipments from anyone tendering them. It has rates on file with the Interstate Commerce Commission and complies with the orders of the Commission. Its rates are approved by the Commission. The company does no other business.

There are three pumping stations along the line in Missouri. These stations are used to boost the oil through the line. The capacity of the line depends on the number of stations and the distance between them. It is necessary to have stations at various points. These stations build up the pressure on the line and boost it through. They are not storage tanks in any sense. It is approximately eighty miles between stations. The station is a building with pumps and engines in it.

The pumping stations at Shellton, Roxdale and Yarna consist each of a pumping station building, which houses the pumping units. There are three 12,000-barrel pumps at each station directly connected to the engine which operates them. Only two of the pumps and engines are operated at one time, giving the line a capacity of 24,000 barrels per twenty-four hours. The other structures at each station consist of an auxiliary building, which houses auxiliary equipment, that is, steam-heating equipment, four plant electric generators, etc., to be used in the operation of the pumping station, cottages for the employes and one 37,500-barrel tank and a smaller tank of 1,000-barrel capacity, known as a "flow tank," and there are miscellaneous pipe and connections, water supply, sewer system and that sort of thing used in connection with the houses and the operation of the station.

The oil comes in the pipe line from Cushing. When it reaches Shellton it flows directly to the pumps and is pumped on through the lines to the next station. The effect of the pumps is to increase the pressure from Shellton on. The purpose of the 1,000-barrel flow tank is this: It is impossible to so synchronize all of the pumping stations that each station will handle the amount of the station behind it, and the thousand-barrel tank does what is called "ride on the suction line." For exam-

ple, if the station at Shellton pumps less than comes in from the station behind it, the oil will rise in the flow tank. If Shellton station pumps more oil than it receives, the oil will go down in the flow tank. The flow tank is used to put the stations "in step"; to take care of the little differences of operations between two stations, and to give the dispatchers an idea of what the stations are doing, so they can more accurately control the pumping. The flow tank is directly connected with the pipe line at all times.

The 37,500-barrel tank is used solely in case of an emergency. It is connected with the pipe line, but is normally shut off by use of a valve in the line. If a line breaks ahead of the pumping station or anything happens to a station, it is advisable not to shut the line down in its entirety. From an operating standpoint you have to keep the stream in motion, because particularly in the winter time the oil becomes very viscous and cold, and it is almost impossible, if you once shut it down, to start it again; therefore as much of the oil is kept in operation as possible by cutting the stream into the 37,500-barrel tank until the pipe line is fixed. Then the pumping is resumed and the oil in the 37,500-barrel tank is run back into the line and the pump started at a higher rate than that at which the oil is coming in. The difference is thus taken out of the 37,500-bar-

rel tank and the contents are thus pumped into the line.

The arrangements for the transportation of oil with shippers are made wherever the business is available; sometimes in St. Louis, sometimes in other places. Mr. Airey, one of the directors of the company in New York, has at times made contracts with shippers. Part of the details of one shipment were arranged in Bartlesville, Oklahoma. Some contracts or details of arrangements are made at Tulsa. If a man wants to ship oil, the company makes connection to its tanks. He either writes a letter or comes to see the representatives of the company or they go to see him, or he calls by telephone and asks the condition of the traffic through the line, so he can find out whether he can get his crude promptly, or whether there will be a delay in transportation. The company gives what is known as a "run ticket," which is a receipt for the oil. That is fixed by the act to regulate interstate commerce. Those receipts are made out and given to the shipper at Cushing. He gets a receipt as he delivers the oil. He does not get any written contract from St. Louis at all.

The company has offices in Oklahoma, Missouri and Maryland. Stockholders' meetings are held in Maryland. Directors' meetings are held wherever they get a quorum or necessity demands. The directors reside partially in Missouri and partially in New

York. There was a time when the majority of the directors resided in New York.

The home office is in Maryland; it is a statutory office. The office in St. Louis consists of three or four rooms located in the Arcade Building. The company has a telephone. The number is in the telephone book. The company is called there by various people from various points. The president of the company is in charge there, Mr. F. Godber. The other officials are secretary, treasurer and two vice-presidents; that is five officers. The secretary is in charge of the records and books of accounts. He has them in his office in the Arcade Building. He has charge of the stock certificate books in his office in St. Louis. The treasurer has custody of the finance or cash of the company. It maintains accounts of deposit in St. Louis. Wages are paid for St. Louis employes out of the office at St. Louis. They consist of clerical employes in the office, stenographers, clerks and bookkeepers. There are three or four stenographers. The company has six or eight employes in the St. Louis office, in addition to the officers. They all receive their pay at that office. The company pays rent for the offices. It doesn't own the building.

The office in Oklahoma consists of four or five rooms in a one-story frame building. It is an office building. There are no other offices in it. It is a permanent building built on the company's property. The super-

intendent of operations has his office there and other employes incident to that office. There are ten or twelve employes in that office. There is the superintendent of operations, his assistants, the master mechanic, station employes, chief engineer, gaugers, etc.

The officers are in St. Louis. They maintain their offices there and carry on their duties at their offices. The company has bookkeepers in St. Louis. They keep accounts and the books.

It requires attention to maintain the line across the state. Repairs have to be made if anything breaks. Men are sent out to do the work. The line is made of 10-inch steel. It comes from various pipe factories outside of Missouri. The company maintains track walkers or line walkers going over that line daily. One man walks it alone; takes a section.

The office building in Oklahoma is at what is known as "transit station," about two miles south of Cushing. The line walkers have regular homes along the line and patrol the line in both directions from their homes. They get their instructions from Cushing. The inspectors who ride in Ford automobiles frequently operate both in Oklahoma and Missouri, across the state line. The time of employes is kept in the Cushing office and sent to St. Louis, where the checks are prepared and mailed back to Cushing, from which point they are distributed.

The company owns no real estate in Missouri disconnected from pipe lines. It owns automobiles and trucks used in Missouri; mostly Fords. The trucks are used for hauling men, freight and material. They are probably maintained, that is, the mechanical requirements are maintained, in Missouri, and the material. There are six or eight cars and trucks altogether. The company makes property tax returns to the various counties. It has office equipment, that is, furniture.

Pipe lines, pumping stations, automobiles, telephone and telegraph lines and office equipment are the only things the company has in the State of Missouri.

Sometimes, for emergency repairs, purchases of material and supplies to maintain trucks are made locally. The company keeps a supply of such things at Cushing, and sometimes a requisition is sent to the Cushing office for the material and supplies from the warehouse at that point. Supplies are secured and repairs made wherever it is most convenient. It depends on circumstances entirely, on the condition of the truck, whether it can be driven, whether the repairs need to be made immediately or whether they can wait.

The revenue is collected at St. Louis. The books of account are kept there, as also are the books of rec-

ord, such as stock certificates and records of stockholders' meetings.

The pay checks are made in the St. Louis office from time sheets kept in Cushing.

The president resides in St. Louis.

There are three vice-presidents, two in St. Louis, one in New York.

The company has never exercised the right of eminent domain in Missouri. It regards that right as a valuable right, enabling it to change its line if necessary. An accident might happen to the line or part of the country might be opened up in subdivisions and put the line in a public road. Then it might become necessary to move the line, and without the right of eminent domain the company would be entirely at the mercy of the property owners on either side.

If damage occurs as the result of a break in the line, a claim agent is sent out and he arrives at a settlement with the property owner if possible.

The company pays general ad valorem taxes to the State of Missouri on its right of way, real estate and personal property. When the company obtained original certificate and license from the State of Missouri it paid $2,696.50, and on August 18, 1921, it paid a further tax of $3,705.00 on account of its increased capital. It has paid its property taxes to

the state right along. The amount of the tax in controversy here for the year 1921 amounts to $4,725.53, and to approximately $7,132.74 for subsequent years (Rec., p. 18).

The taxes in question here are taxes for the year 1921 and thereafter. Taxes for the year 1921 are governed by Sections 9836 to 9848, inclusive, of the Revised Statutes of Missouri 1919. Taxes for subsequent years are governed by said sections as amended by Session Laws of Missouri 1921, Extra Session, page 121. For the convenience of the Court we here set out the statutes in question:

REVISED LAWS OF MISSOURI 1919.

Sec. 9836. Annual Franchise Tax.—Every corporation organized under the laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the State of Missouri equal to one-tenth of 1 per cent of the par value of its outstanding capital stock and surplus, or, if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-tenth of 1 per cent of its capital stock employed in this state, and for the purposes of this article such corporations shall be deemed to have employed in this state that proportion of its entire outstanding capital

stock and surplus that its property and assets in this state bear to all its property and assets wherever located. Every corporation, not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the State of Missouri equal to one-tenth of 1 per cent of the par value of its capital stock and surplus employed of Missouri equal to one-tenth of 1 per cent of the par value of its capital stock and surplus employed in business in this state, and for the purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bear to all its property and assets wherever located: Provided, that this law shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this state, and insurance companies, which pay an annual tax on their gross premium receipts in this state.

Sec. 9837. Corporations to Make Report, to Whom —When, to Contain, What.—Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the Missouri Tax Commission, if it is in existence, and if not, then to the State Board of Equalization, annually on or before the first day of February, in such form as said Commission or said Board of Equalization may prescribe.

Such report shall be signed and sworn to before an officer duly authorized to administer oaths by the president, vice-president, secretary, treasurer or general manager of the corporation, and shall contain the following:

1. Name of corporation.

2. The location of its principal business office.

3. The names of its president, vice-president, secretary, treasurer, and members of the board of directors, with the residence and postoffice address of each.

4. The amount of authorized capital stock.

5. The amount of capital stock subscribed.

6. The amount of capital stock issued and outstanding.

7. The amount of capital stock paid up.

8. The par value of the stock.

9. The clear market value of the stock.

10. The amount of surplus and undivided profits.

11. The nature and kind of business in which the corporation is engaged and the location of its place or places of business.

12. The clear market value of its property and assets in this state.

13. The clear market value of its property and assets without this state.

14. The clear market value of its total capital stock, surplus, property and assets.

15. The change, or changes, if any, in the above particulars made since the last annual report.

Sec. 9838. State Tax Commission to Determine Amount—State Auditor to Make Tax Bills When—Taxes, When Due, etc.—The State Tax Commission or the State Board of Equalization, as the case may be, shall, on or before the 20th day of February in each year, determine from the facts reported, and from any facts within or coming to its knowledge, the proportion of the capital stock and surplus of each corporation employed in business in this state and the amount of the tax each corporation is liable to pay under the provisions of this article, and shall report the same to the State Auditor, who shall make out a tax bill therefor against each corporation and shall deliver the same to the State Treasurer and charge him therewith. The taxes provided for in this article shall be paid on or before the 15th day of April in each year and shall be due and payable to the State Treasurer without notice, who shall make out and deliver a receipt therefor, which shall recite that the corporation named therein has paid its annual franchise tax under the provisions of this article for the year ending on the 31st day of the following December.

Sec. 9839. Written Report, Who Shall Make, etc.—Every corporation organized under the laws of this

state and every foreign corporation engaged in business in this state and having no capital stock shall make a report in writing to the Missouri Tax Commission, or, if it is not in existence, to the State Board of Equalization, annually, on or before the first day of February, in such form as said Commission or said State Board of Equalization may prescribe. The report shall be signed and sworn to before an officer authorized to administer oaths by the president, vice-president, secretary, treasurer or other chief officer of the corporation, and forwarded to said Commission or said State Board of Equalization, as the case may be; provided, that all state, district, county, town and farmers' mutual companies now organized or that may be hereafter organized under any of the laws of this state, organized for the sole purpose of writing fire, lightning, windstorm, tornado, cyclone, hail and plate glass and mutual automobile insurance and for the purpose of paying any loss incurred by any member by assessment, shall not be required to make reports and shall be exempt from all the provisions of this section and article and shall not be required to pay any fees as in this article provided.

Sec. 9840. Report to contain.—Such report so made shall contain the following:

1. The name of the corporation.
2. The location of its principal office.

3. The names of the president, vice-president, secretary, treasurer and members of the board of directors, with the postoffice address of each.

4. The date of annual election of officers.

5. The nature of the business in which such corporation is engaged.

Sec. 9841. State Tax Commission, duties—annual fees.—Upon the filing of the report provided for in sections 9839 and 9840 of this article, said Commission or said State Board of Equalization, as the case may be, shall report to the State Auditor on or before the 20th day of February of every year, who shall charge and certify to the State Treasurer on or before August 1st of every year for collection as herein provided a fee of twenty-five dollars for every corporation organized as a mutual insurance corporation not having a capital stock, or any other corporation not organized strictly for religious, charitable or educational purposes and having no capital stock, or of a company or association organized to transact business of life or accident insurance on the assessment plan for the purpose of mutual protection and benefit to its members and the payment of stipulated sums of money to the family, heirs, executors, administrators or assigns of the deceased member thereof. All foreign life, fire, accident, surety, liability, steam boiler, tornado, health or other kind

of insurance company of whatever nature coming within the provisions of sections 9839 and 9840 and doing business in this state, having an outstanding capital stock of less than five hundred thousand dollars ($500,000.00) shall pay an annual fee of fifty dollars ($50.00), and all other such insurance companies having a capital stock of more than five hundred thousand dollars ($500,000.00) an annual fee of one hundred dollars ($100.00) for the privilege of doing business in this state, and all building and loan associations to pay an annual fee to the state of twenty-five dollars ($25.00) for the privilege of doing business in this state, in place of the fee based on the capital as hereinbefore provided.

Sec. 9842. Taxes to be a lien.—The taxes and penalties to be paid by the provisions of this article shall be a first lien on all property and assets of the corporation within this state.

Sec. 9843. Delinquents—how collected—penalty.—If any corporation fails or refuses to pay the taxes assessed against it under the provisions of this article on or before the first day of May, the State Treasurer shall certify a list of such corporations so delinquent to the Attorney-General, who shall proceed forthwith to collect the same, together with a penalty of 25 per cent and interest at the rate of one per cent per month. Suits for the collection of

such taxes may be brought in the name of the state in any court of competent jurisdiction and any judgment rendered therein in favor of the state shall be a first lien on all the property and assets of the corporation within this state.

Section 9844. Failure to make report, prosecuting attorney to bring action, etc. If any corporation subject to the provisions of this article shall fail or neglect to make the report herein required or within the time herein required, such corporation, ir organized under the laws of this state, shall forfeit its charter, or, if a foreign corporation, shall forfeit its right to engage in business in this state, and the Attorney-General or, at his direction the Prosecuting Attorney of the county in which such corporation has its principal business office, shall bring an action in the name of the state in some court of competent jurisdiction to annul the charter or revoke the license of such corporation to engage in business in this state.

Section 9845. Value of property—not to be set out, when. All insurance companies, building and loan associations and other corporations, the fees of which are fixed at lump sums by this article, and all corporations which employ all their property and all their outstanding capital stock in this state shall all report and pay the fees on all its outstanding

capital stock, whether employed in this state or not, shall not be required to set out in the report required by this article the value of its property within this state or without the state.

Secion 9846. Board may summon witnesses, take testimony, etc., when. If any corporation subject to the provisions of this article fails or refuses to make full and complete answers to the questions contained in the report required to be filed by it or if the Tax Commission or State Board of Equalization, as the case may be, finds that any answer or answers contained in said report are untrue or if said Tax Commission or the State Board of Equalization, as the case may be, has reason to believe and does believe that any corporation has made a false statement or concealed any fact or facts which are material in determining the amount of tax for which such corporation is liable or ought to be liable under the provisions of this article, then said commissioners may require the delinquent corporation, its officers, agents or employes to furnish information concerning their capital stock which is necessary in determining the amount of tax to be paid by them, and for that purpose said Commission or said State Board of Equalization, as the case may be, may summon witnesses to appear and give testimony and to produce records, books, papers, documents and all other

information of any kind or character required relating to any matter necessary to be ascertained for the purpose of arriving at the amount of such tax to be paid. The witnesses may be summoned by subpoena issued by any member of such commission or the secretary thereof, in the name of the commission, if such commission be in existence, in the name of such board, directed to the Sheriff of any county in the state and returnable to said Commission or said State Board of Equalization, as the case may be, which subpoena shall be served in like manner and the same effect and under similar conditions as if issued out of the Circuit Court. Such Commission or the State Board of Equalization, as the case may be, is also authorized to take depositions of witnesses residing within or without the state or absent therefrom, to be taken upon notice to the interested parties, if any, in like manner that depositions of witnesses are taken in civil cases in the Circuit Court in any matter which the Commission may have authority to investigate and determine. Oaths of witnesses in any matter under investigation or consideration of such Commission or State Board of Equalization, as the case may be, may be administered by the secretary or any member of such Commission or the State Board of Equalization, as the case may be. In case any witness shall fail to obey any subpoena or summons to appear before said Commission or

shall refuse to testify or answer any material questions and to produce records, books, papers or documents when required so to do, such failure or refusal shall be reported to the Attorney-General, who shall thereupon proceed in the proper course to compel obedience to any subpoena or summons or proper order of the Commission or State Board of Equalization, as the case may be, and said Commission or board may punish witnesses for any improper neglect or refusal.

Sec. 9847. Powers of Commission, etc.—Said Commission or said State Board of Equalization, as the case may be, shall have power to appoint a commissioner to take testimony in any proceeding or inquiry arising under the provisions of this article, and such Commissioner may take testimony within or without the state and have all the power and authority of said Commission or Board of Equalization to compel witnesses to appear and give testimony and to produce records, books, papers, documents or other evidence; such Commissioner shall return all testimony and evidence so taken to the Commission or Board of Equalization and shall be allowed a reasonable compensation and expenses, including stenographic fees. Any witness who shall knowingly or willfully give false answers to any questions propounded in any such sworn examination where the fact inquired of is within his knowledge shall be

deemed guilty of perjury. It shall be unlawful for any member of the Missouri Tax Commission or any member of the State Board of Equalization, as the case may be, or for any officer or employe of such Commission or such State Board of Equalization, as the case may be, or for any other officer or employe of the state to divulge or make known in any manner whatever not provided by law to any person any information obtained by them in the discharge of their official duties, or to divulge or make known in any manner not provided by law any document reviewed or evidence taken or report made under this article. Any offense against the foregoing provisions shall be a misdemeanor and shall be punished by a fine not exceeding one thousand dollars ($1,000.00) or by imprisonment in the county jail not exceeding six months.

Sec. 9848. Failure of Commission—State Board of Equalization to Act.—In the event that the State Tax Commission is not created or in existence all the powers and duties of such Commission under the provisions of this article shall devolve upon and be exercised and performed by the State Board of Equalization, and in such event the State Board of Equalization may employ such stenographic and clerical and other assistance as may be necessary to the proper carrying out of the provisions of this law.

SESSION LAWS OF 1921—EXTRA SESSION, PAGE 121.

Private Corporations: Relating to franchise tax upon private corporations, reports to be made, to whom and by whom to be made, annual fees and providing for collection of delinquent taxes.

Section 1. Repealing Section 9836, Article I, Chapter 90, R. S. of Mo. 1919, and Enacting New Section.—That Section 9836 of Article I, Chapter 90 of the Revised Statutes of Missouri 1919, is hereby repealed and a new section is enacted in lieu thereof to be known as Section 9836, and to read as follows:

Sec. 9836. Annual Franchise Tax.—Every corporation organized under the laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the State of Missouri equal to one-twentieth of one per cent of the par value of its outstanding capital stock and surplus, or if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent of its outstanding capital stock and surplus employed in this state, and for the purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock

and surplus that its property and assets in this state bears to all its property and assets wherever located. Every corporation not organized under the laws of this state and engaged in business in this state shall pay an annual franchise tax to the State of Missouri equal to one-twentieth of one per cent of the par value of its capital stock and surplus employed in business in this state, and for the purpose of this article such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located; provided, that this law shall not apply to corporations not organized for profit, nor to express companies which now pay an annual tax on their gross receipts in this state, and insurance companies which pay an annual tax on their gross premium receipts in this state. Provided, bank deposits shall be considered as funds of the individual depositor, left for safekeeping, and shall not be considered in computing the amount of tax collectible under the provisions of this act. If this provision, exempting bank deposits shall be declared unconstitutional by the courts, then the Legislature hereby declares that it is the intention that the remainder of this act shall be in full force and effect, and further declaring that it would have passed this act irrespective of the said exempting provision.

Sec. 2. Repealing Section 9837, Article I, Chapter 90, R. S. of Mo. 1919, and Enacting New Section.—That Section 9837 of Article I, Chapter 90 of the Revised Statutes of Missouri 1919, is hereby repealed and a new section is enacted in lieu thereof, to be known as section 9837, and to read as follows:

Sec. 9837. Corporations to Make Reports, to Whom —When—to Contain What.—Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the Missouri Tax Commission, if it is in existence, and, if not, then to the State Board of Equalization annually, on or before the 1st day of March in such form as said Commission or said Board of Equalization may prescribe. Such report shall be signed and sworn to before an officer duly authorized to administer oaths by the president, vice-president, secretary, treasurer or general manager of the corporation, and shall contain the following:

1. Name of corporation.
2. The location of its principal business office.
3. The names of its president, vice-president, secretary, treasurer and members of the board of directors, with the residence and post office address of each.
4. The amount of authorized capital stock.
5. The amount of capital stock subscribed.

6. The amount of capital stock issued and outstanding.

7. The amount of capital stock paid up.

8. The par value of the stock.

9. The clear market value of the stock.

10. The amount of surplus and undivided profits on the 31st day of the preceding December, or on the last day of the preceding fiscal year of said corporation.

11. The nature and kind of business in which the corporation is engaged and the location of its place or places of business.

12. The clear market value of its property and assets in this state.

13. The clear market value of its property and assets without this state.

14. The clear market value of its total property and assets.

15. The amount of liabilities.

16. The change or changes, if any, in the above particulars made since the last annual report.

Sec. 3. Repealing Section 9838, Article I, Chapter 90, R. S. of Mo. 1919, and Enacting New Section.— That Section 9838 of Article I, Chapter 90 of the Revised Statutes of Missouri 1919, is hereby repealed and a new section is enacted in lieu thereof to be known as section 9838, and to read as follows:

Sec. 9838, State Tax Commission to Determine Amount—State Auditor to Make Tax Bills, When—Taxes, When Due, etc.—The State Tax Commission, or the State Board of Equalization, as the case may be, shall, on or before the 20th day of March in each year, determine from the facts reported, and from any facts within or coming to its knowledge, the proportion of the capital stock and surplus of each corporation employed in business in this state, and the amount of tax each corporation is liable to pay under the provisions of this article, and shall report the same to the State Auditor, who shall make out a tax bill therefor against each corporation and shall deliver the same to the State Treasurer and charge him therewith. The taxes provided for in this article shall be paid on or before the 15th day of May in each year, and shall be due and payable to the State Treasurer without notice, who shall make out and deliver a receipt therefor, which shall recite that the corporation named therein has paid its annual franchise tax under the provisions of this article for the year ending 31st day of the following December.

Sec. 4. Repealing Section 9839, Article I, Chapter 90, R. S. Mo. 1919, and Enacting New Section.—That Section 9839 of Article I, Chapter 90 of the Revised Statutes of Missouri 1919, is hereby repealed and a new section is enacted in lieu thereof to be known as section 9839, and to read as follows:

Sec. 9839. Written Reports, Who Shall Make, etc.— Every corporation organized under the laws of this state, and every foreign corporation engaged in business in this state and having no capital stock, shall make a report in writing to the Missouri Tax Commission, or if it is not in existence, to the State Board of Equalization, annually, on or before the first day of March, in such form as said Commission or said Board of Equalization may prescribe. The report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice-president, secretary, treasurer or other chief officer of the corporation, and forwarded to said Commission or said State Board of Equalization, as the case may be: Provided, that all state, district, county, town and farmers' mutual companies now organized or that may be hereafter organized under any of the laws of this state, organized for the sole purpose of writing fire, lightning, windstorm, tornado, cyclone, hail and plate-glass and mutual automobile insurance and for the purpose of paying any loss incurred by any member by assessment, shall not be required to make reports and shall be exempt from all the provisions of this section and article, and shall not be required to pay any fees as in this article provided.

Sec. 5. Repealing Section 9840, Article I, Chapter 90, R. S. of Mo. 1919, and Enacting New Section.—That Section 9840 of Article I, Chapter 90, of the Revised

Statutes of Missouri 1919, is hereby repealed and a new section is enacted in lieu thereof to be known as section 9840 and to read as follows:

Sec. 9840. Information Reports Shall Contain.— Such report so made shall contain the following:

1. The name of the corporation.

2. The location of its principal office.

3. The names of the president, vice-president, secretary, treasurer and members of the board of directors with the post office address of each.

4. The date of annual election of officers.

5. The nature of the business in which such corporation is engaged.

Sec. 6. Repealing Section 9841, Article I, Chapter 90, R. S. of Mo. 1919, and Enacting New Section.— That Section 9841 of Article I, Chapter 90, of the Revised Statutes of Missouri 1919, is hereby repealed and a new section is enacted in lieu thereof to be known as section 9841, and to read as follows:

Sec. 9341. State Tax Commission—Duties—Annual Fees.—Upon the filing of the report provided for in sections 9839 and 9840 of this article said Commission or said State Board of Equalization, as the case may be, shall report to the State Auditor on or before the 20th day of March of every year, who shall charge and certify to the State Treasurer on or before August 1st of every year for collection as herein

provided, a fee of twenty-five dollars for every corporation organized as a mutual insurance corporation not having a capital stock, or any other corporation not organized strictly for religious, charitable or educational purposes and having no capital stock, or of a company or association organized to transact business of life or accident insurance on the assessment plan for the purpose of mutual protection and benefit to its members and the payment of stipulated sums of money to the family, heirs, executors, administrators or assigns of the deceased member thereof. All foreign life, fire, accident, surety, liability, steam boiler, tornado, health or other kind of insurance company of whatever nature coming within the provisions of sections 9839 and 9840 and doing business in this state having an outstanding capital stock of less than five hundred thousand dollars ($500,000) shall pay an annual fee of fifty dollars ($50), and all other such insurance companies having a capital stock of more than five hundred thousand dollars ($500,000) an annual fee of one hundred dollars ($100) for the privilege of doing business in this state, and all building and loan associations to pay an annual fee to the state of twenty-five dollars ($25) for the privilege of doing business in this state, in place of the fee based on the capital stock and surplus as hereinbefore provided.

Section 7. Repealing Section 9843, Article I, Chapter 90, R. S. of Mo. 1919, and enacting new section.— That Section 9843 of Article I, Chapter 90, of the Revised Statutes of Missouri 1919, is hereby repealed and a new section is enacted in lieu thereof to be known as section 9843, and to read as follows:

Section 9843. Delinquents—how collected—penalty.—If any corporation fails or refuses to pay the taxes assessed against it under the provisions of this article on or before the first day of June the State Treasurer shall certify a list of such corporations so delinquent to the Attorney-General, who shall proceed forthwith to collect the same, together with a penalty of 25 per cent and interest at the rate of 1 per cent per month. Suits for the collection of such taxes may be brought in the name of the state in any court of competent jurisdiction and any judgment rendered therein in favor of the state shall be a first lien on all property and assets of the corporation within this state.

Section 8. Repealing Section 9845, Article I, Chapter 90, R. S. of Mo. 1919, and enacting new section.— That Section 9845 of Article I, Chapter 90, of the Revised Statutes of Missouri 1919, is hereby repealed and a new section is enacted in lieu thereof to be known as section 9845 and to read as follows:

Section 9845. Value of property—not to be set out in report—when.—All insurance companies, building and loan associations and other corporations, the fees of which are fixed at lump sums by this article, and all corporations which employ all their property and all their outstanding capital stock in this state or which will report and pay the fees on all of its outstanding capital stock, whether employed in this state or not, shall not be required to set out in the report required by this article the value of its property within this state or without the state. Approved August 4, 1921.

SPECIFICATIONS OF ERROR.

1. The Court erred in ruling that the Corporation Franchise Tax Law of the State of Missouri, as said law has been construed by the defendants, does not violate the commerce clause of the Constitution of the United States, to wit, Section 8 of Article I of said Constitution.

2. The Court erred in ruling that under the evidence appellant was doing an intrastate business within the State of Missouri and is therefore subject to pay a tax under the Corporation Franchise Tax Law of said state.

3. The Court erred in not ruling that under the law and the evidence the plaintiff was doing only an interstate business through and across the State of Missouri and that the attempt of the State of Missouri to levy a Corporation Franchise Tax against said plaintiff on account of said interstate business is a violation of Section 8, Article I, of the Constitution of the United States.

4. The Court erred in ruling that the fact that the plaintiff is authorized by its charter to engage in other business than that of interstate business is material and in not ruling that the only question involved was whether as a matter of fact said corpo-

ration was engaged in any other business than that of interstate commerce.

5. The Court erred in ruling that the fact that plaintiff maintains an office in the City of St. Louis and owns property in the State of Missouri, all of which is incidental to the transaction of interstate commerce, renders it subject to the Corporation Franchise Tax of the State of Missouri and that the maintenance of said office and the owning of such property constitutes doing intrastate business within the State of Missouri.

6. The Court erred in ruling that the fact that the plaintiff filed with the Secretary of the State of Missouri a copy of its charter and obtained a license from said state and paid the fees for said license renders it liable to the tax provided for by the Corporation Franchise Tax Law of said state and is evidence that said company is doing an intrastate business within the State of Missouri.

POINTS AND AUTHORITIES.

I.

The Missouri franchise tax, provided for by Sections 9836 to 9848, Revised Statutes of Missouri 1919, is a privilege license or excise tax; that is, it is a tax upon the privilege of doing business.

State ex rel. Marquette Hotel Investment Company v. State Tax Commission, 282 Mo. 213, l. c. 234.

II.

The maintenance of the office in St. Louis for the purposes shown in the evidence did not constitute doing an interstate business within the state which would be subject to taxation, nor did the maintenance of the pipe line nor the other activities described in the evidence. All of these activities centered around the interstate business of the company.

Cheney Bros. Company v. Massachusetts, 246 U. S. 147;

Norfolk & Western R. R. Company v. Pennsylvania, 136 U. S. 114, l. c. 120;

Gloucester Ferry Company v. Pennsylvania, 114 U. S. 196;

Philadelphia and Southern Mail Steamship Company v. Pennsylvania, 122 U. S. 326;

McCall v. California, 136 U. S. 104;
Pembina Consolidated Silver Mining & Milling Company v. Pennsylvania, 125 U. S. 181, l. c. 186 and 190.

III.

The powers granted to the company in the original charter issued to it by the State of Maryland are not decisive of the question raised as to what, if any, business the corporation does within the State of Missouri. That question is a question of fact and not of charter powers.

Upon this point we have cited no authorities specifically ruling upon the question. It is obvious, however, that a state cannot tax a foreign corporation for doing business within the state merely because it has the charter power to do so. See heading III of our argument, infra.

IV.

The fact that the company obtained a license from the Secretary of the State of Missouri under the Missouri statutes applicable to foreign corporations doing business within the state does not indicate that the company was doing an intrastate business.

Norfolk & Western R. R. Company v. Pennsylvania, 136 U. S. 114.

At the time the license was obtained from the state the company was beginning the construction of its pipe line and it desired to have the same rights as a Missouri corporation, including the right of eminent domain. Pipe line companies in Missouri have the right of eminent domain.

Section 1791, Revised Statutes of Missouri 1919. A foreign corporation complying with the Missouri statutes has the same right.

> Southern Illinois & Missouri Bridge Co. v. Stone, 174 Mo. 1.

Even if the corporation had been originally incorporated in Missouri, it would not be subject to a tax upon interstate commerce.

> Philadelphia & Southern Mail Steamship Company v. Pennsylvania, 122 U. S. 326.

Certainly, therefore, the obtaining of a license from the state by a foreign corporation would not render its interstate business taxable.

V.

No state may levy a franchise or excise tax upon a company doing solely an interstate business in, through or across the state. The transportation of oil from one state to another is interstate commerce.

> Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265;

United Fuel Gas Company v. Hallanan, 257 U. S. 277;
Kansas City, Ft. Scott & Memphis Ry. Co. v. Bottkin, 240 U. S. 227;
Le Loup v. Port of Mobile, 127 U. S. 640.

VI.

Even where a corporation is doing both an interstate and an intrastate business, although the state has the power to tax the intrastate business, nevertheless, where the tax is so levied as to include, or compel the payment of, a tax upon the interstate business, it will be void.

Oklahoma v. Wells Fargo & Co., 223 U. S. 298;
Pullman Company v. Kansas, 216 U. S. 56;
Western Union Telegraph Co. v. Kansas, 216 U. S. 1;
International Paper Co. v. Massachusetts, 246 U. S. 135;
Crew Leavick v. Pennsylvania, 245 U. S. 292;
Looney v. Crane Co., 245 U. S. 178;
Ludwig v. Western Union Telegraph Co., 216 U. S. 146;
Locomobile Co. of America v. Massachusetts, 246 U. S. 146.

VII.

This case does not come within the principle of those cases holding that where a tax, though in form

a privilege tax, is in substance and effect a general property tax, it is valid.

> Postal Telegraph-Cable Co. v. Adams, 155 U. S. 688.

Nor does this case come within the principle of those cases holding that where the tax is a tax upon intrastate commerce the mere fact that the method of computation requires reference to interstate business will not render it invalid.

> Hump Hair Pin Manufacturing Co. v. Emmerson, 258 U. S. 290.

ARGUMENT.

From the evidence it clearly appears that the plaintiff was doing strictly an interstate business. Its business consists in owning and operating a pipe line from the Mid-Continent oil fields of Oklahoma to the Town of Wood River, Illinois. The pipe line extends from the oil fields in Oklahoma to the state line, thence across the State of Missouri, under the Mississippi River and to Wood River. The company makes no deliveries in Missouri and receives no shipments in Missouri. It has an office located in St. Louis; its president and its vice-president and some of the directors reside in St. Louis; the general manager resides in St. Louis; at least one of the directors resides in New York; stockholders' meetings are held in Maryland; directors' meetings are held where it is possible to get a quorum, sometimes in New York, sometimes in St. Louis. It also has an office at Transit Station near Cushing, Oklahoma. It employs men for the maintenance and operation of the pipe line, and owns some automobiles which are used for the same purpose All of its activities center around the interstate business of transporting oil by pipe line from Oklahoma to Illinois.

I.

The tax which the state is attempting to enforce under the provisions of Sections 9836 to 9848, Revised Statutes of Missouri 1919, as amended by Laws of Missouri 1921, Extra Session, p. 121, is a privilege, license, or excise tax; that is, it is a tax upon the privilege of doing business.

This was decided by the Supreme Court of Missouri in the case of State ex rel. Marquette Hotel Investment Company v. State Tax Commission, 282 Mo. 213. The Court says, on motion for rehearing (p. 234):

> "A franchise tax is not one levied upon property but one placed on the right to do business. It may be graduated according to the extent of the business done. The act before us contemplates a tax upon the right to do business in accordance with the property actually used in the business."

It was amply shown in the testimony that the company pays general and ad valorem taxes upon its property located in Missouri. The present tax, therefore, is not in lieu of a general property tax; it is an additional burden which is a tax upon the privilege of doing business, and as the business done is strictly interstate business the state is without the power to tax that business.

Although this tax is levied upon the privilege of doing business within the state, it is not based upon the proportion of business done in the state to total business. The tax is levied upon the capital stock and the surplus of the company, not in accordance with the ratio of business done in the state to total business, but in accordance with the ratio which the assets in the state bear to the total assets. If the tax were levied upon that proportion of its capital stock and surplus which the business done within the state bears to the total business, this controversy could never have arisen, for the reason that the state in attempting to levy the tax would find no business done within the state. The proportion of business done within the state to total business would be zero.

But the language of the act is that the tax shall be levied in the proportion which the assets located in Missouri bear to the total assets. While the company does no business in Missouri, 50 per cent of its assets lie within that state, so that if the tax is sustained it will pay a tax upon 50 per cent of its capital and surplus. It is the contention of the State that maintaining an office in the state where directors' meetings are held, and where the president and some other officers have their headquarters, and the operation of trucks and automobiles along the line, and the other various activities described in the evidence, constitute doing business within the state, and

that the company is therefore liable for the payment of the tax, notwithstanding the fact that all of its receipts and earnings come from interstate commerce.

This contention was upheld by the lower court, which ruled that the maintenance of an office and office force described in the evidence and the conducting of other activities shown in the evidence constituted doing business within the state.

II.

The Maintenance of the St. Louis Office.

The lower court based its ruling largely upon the cases of Copper Range Company and Champion Copper Company v. Massachusetts, reported in Cheney Brothers Company v. Massachusetts, 246 U. S. 147 (Rec., p. 44). In the opinion of the lower court it is said, speaking of these cases:

> "In his opinion Mr. Justice Vandeventer made a very helpful and practical analysis of the activities which are held to constitute local business affording basis for a tax of this nature, and pointed out the controlling distinctions. In my opinion that case is decisive of this controversy under the testimony produced at the hearing."

We submit, however, that this ruling of the lower court was based upon a misapprehension. The opin-

ion reported in Cheney Brothers v. Massachusetts, so far as it touches upon the liability of the Copper Range Company and the Champion Copper Company, is very short. In regard to the Copper Range Company the Court says (l. c. 155):

> "This is a Michigan corporation, whose articles of association contemplate that it shall have an office in Boston—it is a holding company and owns various corporate stocks and bonds and certain mineral lands in Michigan. Its activities in Massachusetts consist in holding stockholders' and directors' meetings, keeping corporate records and financial books of account, receiving monthly dividends from its holdings of stock, depositing the money in Boston banks and paying the same out, less salaries and expenses, as dividends to its stockholders three or four times a year. The exaction of a tax for the exercise of such corporate faculties is within the power of the state. **Interstate commerce is not affected.**"

It is clear enough from the above language that the Copper Range Company was not engaged in interstate commerce. It was a holding company which owned stocks, bonds and mineral lands in Michigan, and under these circumstances the Court ruled that the maintenance of its office in Boston, where stockholders' meetings and directors' meetings were held, corporate records, financial records kept, etc., was doing business within the state and was not doing an

interstate business. The lower court, however, seems to have interpreted this language to mean that whenever a company maintains an office in a state for the purposes set out in the opinion it will be subject to a franchise tax. We do not, however, so read the opinion.

In regard to Champion Copper Company, 246 U. S., l. c. 155, the Court says:

> "This is another Michigan corporation which maintains an office in Boston pursuant to a provision in its articles of association. It deposits the proceeds of its mining and smelting business in Michigan in Boston banks and, after paying salaries and expenses, distributes the balance in dividends from its Boston office. The management of its mine is under the control of a general manager in Michigan and he in turn is under the control of the company's directors. The meetings of the latter, which occur several times in a year, are held in the Boston office. At these meetings the directors receive reports from the treasurer and general manager, vote dividends, elect officers and authorize the execution of deeds and the like for lands in Michigan. **These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that state.**"

Clearly the ruling of the Court was, that these companies, not being engaged in interstate commerce and

maintaining offices in Massachusetts for the purposes set out in the opinion, were doing business in Massachusetts. It does not follow, however, that where a company is engaged solely in interstate commerce and maintains an office in a state for the sole purpose of conducting an interstate business, it is subject to an excise or franchise tax by the state. The lower court, we submit, entirely overlooked the distinction between a corporation maintaining an office within the borders of a state for the purpose of conducting an interstate business and one maintaining such an office for purposes apart from and not related to interstate commerce. That this distinction is vital and was in the mind of the Court when the opinion in Cheney Bros. v. Mass. was delivered is obvious from the fact that the Cheney Bros. Co. were held in that opinion to be not liable to the tax although that company maintained an office in Boston. In referring to that company the Court says, after reviewing the activities of the company and the purpose of maintaining its Boston office, l. c. 153:

> "We do not perceive anything in this that can be regarded as a local business, as distinguished from interstate commerce; the maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are

among the means by which that business is carried on and share its immunity from state taxation." Citing cases.

And the Court continues, referring to certain sales negotiated in Boston of goods located in Connecticut to purchasers in Connecticut:

> "In such cases it doubtless is true that the resulting sale is local to Connecticut, but the action of the Boston office in receiving the order and transmitting it to the home office partakes more of the nature of interstate intercourse than of business local to Massachusetts, and affords no basis for an excise tax in that state (citing cases). We think the tax on this company was essentially a tax on doing an interstate business, and therefore repugnant to the commerce clause."

Thus the Court ruled in this opinion that the Cheney Bros. Co. was engaged in interstate commerce and that, therefore, the maintenance of an office in Boston did not render it liable to an excise tax, but that Copper Range Company and Champion Copper Company were not engaged in interstate commerce and therefore the maintenance of offices by those companies in Boston rendered them liable.

Now it may be said that Cheney Bros. Co. was operating merely a branch office in Boston for the purpose of negotiating sales, whereas Copper Range Company and Champion Copper Company were main-

taining their main offices in Boston. That, however, is not the ground of the decision. That there is no valid ground for the levying of a franchise tax by a state against a company engaged in interstate commerce because it maintains a principal business office within the state is clearly shown by the case (from which we quote below) of Norfolk & Western R. R. Co. v. Pa., 136 U. S. 114. This case was cited with approval in the Cheney Bros. case. If a company is engaged solely in interstate commerce it cannot be taxed by a state in which it maintains an office for the sole purpose of conducting such commerce, and we submit it makes no difference whether this office be for the purpose of holding stockholders' meetings, directors' meetings and general management, or for the purpose of maintaining a sales force within the state.

Norfolk & Western R. R. Co. v. Pennsylvania, 136 U. S. 114.

In this case it appeared that the Norfolk & Western R. R. Co. was a part of a through line extending across the State of Pennsylvania, and that it was engaged in the business of transporting freight and passengers to or from other states out of or into the State of Pennsylvania, or from other states to other states passing through the State of Pennsylvania. It maintained an office in the State of Pennsylvania. The State of Pennsylvania attempted to levy a so-

called license fee for the privilege of maintaining an office or offices in the State of Pennsylvania. The license amounted to one-fourth of a mill on each dollar of capital stock. The Court ruled that the company's business was interstate commerce and then says (l. c. 120):

> "We pass to the second inquiry above stated, viz.: Was the tax assessed against the company for keeping an office in Philadelphia for the use of its officers, stockholders, agents, and employes, a tax upon the business of the company? In other words, was such tax a tax upon any of the means or instruments by which the company was enabled to carry on its business of interstate commerce? We have no hesitancy in answering that question in the affirmative. What was the purpose of the company in establishing an office in the City of Philadelphia? Manifestly for the furtherance of its business interests in the matter of its commercial relations. One of the terms of the contract by which the plaintiff in error became a link in the through line of road referred to in the findings of fact provided that 'it shall be the duty of each initial road member of the line to solicit and procure traffic for the Great Southern Despatch (the name of said through line) at its own proper cost and expense.' Again, the plaintiff in error does not exercise or seek to exercise in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof. Before establishing its

> office in Philadelphia it obtained from the secretary of the commonwealth the certificate required by the Act of the State Legislature of 1874, enabling it to maintain an office in the state. That office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was therefore a tax upon one of the means or instrumentalities of the company's interstate commerce, and, as such, was in violation of the commercial clause of the Constitution of the United States (Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826; Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118, and cases cited; McCall v. California, 136 U. S. 104 [just decided]).''

In the case of Pembina Consolidated Silver Mining & Milling Company v. Pennsylvania, 125 U. S. 181, this Court was considering a license tax levied by the State of Pennsylvania against the mining company for the privilege of maintaining an office within the State of Pennsylvania. The language of the act was that no foreign corporation, with certain exceptions, ''shall have an office or offices in this commonwealth for the use of its officers, stockholders, agents or employes unless it shall first have obtained from the Auditor General an annual license so to do.'' The tax as against the mining company was sustained for the reason that the company was not engaged in interstate commerce. In the opinion of the Court it

is pointed out that a corporation of one state cannot do business in another state without the latter's consent, with certain exceptions, and in commenting upon the exceptions the Court says (l. c. 186):

> "These exceptions do not touch the general doctrine declared as to corporations not carrying on foreign or interstate business, or not employed by the Government. As to these corporations the doctrine of Paul v. Virginia applies. The Colorado corporation (the mining company) does not come within any of the exceptions, therefore the recognition of its existence in Pennsylvania, even to the limited extent of allowing it have an office within its limits for the use of its officers, stockholders, agents and employes, was a matter dependent upon the will of the state."

And again (l. c. 190):

> "The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business, or hire offices there, arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal Government, is not to be restricted by state authority."

The above language was cited and commented upon with approval in the case of McCall v. California, 136 U. S. 104, l. c. 112. In that case the State of California was held to be without the power to levy a license tax upon an agent located in San Francisco of a railroad company operating between Chicago and New York, the agent's sole duty in California being the solicitation of business for the railroad.

It seems to be the contention of the defendants that the company is doing business in Missouri because it maintains offices there and because its officers reside there and perform their duties there. This, however, is merely incidental to the conduct of the interstate business. Such a company has to have offices in some state, and, as a matter of course, it pays wages in some state, and the men who work for it live in some state. Of course, a company can be physically doing business, that is, transacting affairs within the confines of a state, but it is not, in contemplation of law, doing an intrastate business from that fact alone. A company which does an interstate business necessarily manages and transacts that business within the confines of the various states. If the contention of the defendants were correct there could be no such thing as a railroad company or a ferry or steamboat company doing an interstate business; the mere fact that such a company has wharves, tracks, linemen, depots, stations and offices within a state would

indicate that it was doing business within the state, that is, as the defendants contend, was doing an intra-state business. Such a contention, in effect, denies the possibility of a common carrier doing an inter-state business, and the contention is amply answered by this Court in the case above cited of Norfolk & Western R. R. Co. v. Pennsylvania, 136 U. S. 114.

III.

The Original Charter of the Company Granted by the State of Maryland.

In the argument in the lower court some stress was laid upon the charter powers of the corporation under the original charter granted to it by the State of Maryland (Record, page 29). This charter was also commented upon in the opinion of the lower court. The Court says (Record, page 43):

> "Judged, then, by the construction placed upon its business and purposes by complainant itself in its own organic law, it has engaged and is now engaged in the various kinds of business enumerated in some or all of the sections above quoted."

To this we reply:

First. The license which was obtained from the State of Missouri before the company began the construction of its pipe line provides that the company

"is from the date hereof duly authorized and licensed to engage in the State of Missouri exclusively in the business of transporting crude petroleum by pipe line" (Record, page 28, Plaintiff's Exhibit C). We do not believe that either the original charter or the license from the State of Missouri is material to the present controversy, but the lower court has laid considerable stress upon both of these documents. However, it appears from them that before undertaking to construct its pipe line through and across the State of Missouri the corporation saw fit to obtain a license from the state to engage exclusively in the business of transporting crude petroleum by pipe line. So far as this license is material, it shows that the company's desire was to transport crude petroleum by pipe line through and across the State of Missouri, and not to engage in any other business.

Second. The powers of the corporation as contained in its original charter issued by the State of Maryland are certainly not taxable by the State of Missouri, unless they are exercised within the state. The decision of any such case necessarily turns upon a question of fact and not of charter powers. For example, in the case of Norfolk & Western Railroad Company v. Pa., 136 U. S. 114, the Norfolk & Western Railroad Company, in all probability, had charter powers broad enough to enable it to do an intrastate business within the State of Pennsylvania.

No comment, however, is made by the Court upon what the charter powers of the company were. The decision turned, as it must always turn, upon the question of fact as to what business the company was actually engaged in. The same thing may be said of the case of Cheney Brothers Co. v. Massachusetts, 246 U. S. 147. That company was held not liable to the payment of an excise tax for the reason that it was engaged entirely in interstate commerce. The Court makes no comment upon the charter powers of Cheney Brothers Co. It is safe to assume, however, that the corporation had sufficient charter powers to enable it to engage in intrastate as well as interstate commerce.

We have seen no case, involving the question of the right of a state to levy a tax claimed to be invalid because affecting interstate commerce, in which the decision turned upon the charter powers of the company taxed.

An individual has the right to engage in any line of business, but he cannot be taxed, except upon such business as he actually engages in. A corporation may be clothed with very broad and ample powers, but it cannot be taxed for the privilege of engaging in any one of them unless it actually does so.

So far as we are aware, the question of the right of a state to levy a privilege or excise tax upon a

foreign corporation on account of activities authorized by its charter, but never exercised within the state, has never been considered by this Court. It is obvious, however, that the decisions in which the right of a state to levy such a tax is considered have all turned upon the question of fact as to the nature of the business actually done.

If the portions of the company's charter which are commented on by the lower court (Rec., p. 42) are examined it will be seen that the company is clothed with broad powers, all of which, however, are more or less germane to its principal business of operating a pipe line. It has the right, for example, "to acquire, take, hold, own, construct, erect, improve, manage and operate, and to aid and subscribe toward the acquisition, construction or improvement of oil wells, gas wells, mine refineries, manufacturing plants, pipe lines, tanks, cars, piers, wharves, steam and other vessels for water transportation, and any other work, property or appliances which may pertain to or be useful in the conduct of any of the business of the corporation."

Now, it is obvious that the State of Missouri could not tax the company for the privilege of operating oil wells in Missouri, for the reason that it operates no oil wells in Missouri or anywhere else. Is this tax to be justified for the reason that the com-

pany has power under its charter to operate refineries and manufacturing plants, though the company operates no refinery or manufacturing plant? Is the fact that the company has the power under its charter to operate steam and other vessels for water transportation of any possible significance in this controversy? It appears clearly enough that the company does not operate any vessels for water transportation. Therefore the State of Missouri cannot levy a tax upon the company for the privilege of operating such vessels. A privilege tax can only be levied on account of some business actually engaged in or some privilege actually exercised. The present tax can only be justified as a tax upon some business which the company conducts intrastate. The quotations from the company's charter set out in the lower court's opinion (Rec., p. 42) throw but small light upon the real question at issue as to the interstate or intrastate character of the company's business.

IV.

The License Obtained From the State of Missouri.

It is also contended that the company conceded that it desired to do business in the state when it filed its charter with the Secretary of State and paid to the state a license fee for the issuance of a certificate under Section 9792, Revised Statutes of Missouri 1919.

The conduct of the company in so doing, however, by no means indicates that the company desired to engage in intrastate commerce as distinguished from interstate commerce. It did desire to be uninterrupted in the construction and operation and maintenance of its pipe line. As that pipe line extends across the State of Missouri, and as the power of eminent domain was considered essential to the construction of the line, the company filed its charter and obtained the certificate mentioned. Now it will not do to say that if the company desired to engage merely in interstate commrece it would not have filed its charter and would not have paid the license fee and would not have obtained this certificate. The answer to this suggestion is threefold:

First. Even if the company did an unnecessary thing, even if it could have come into the State of Missouri and constructed the pipe line without the consent or license of the state, this fact would have no bearing whatever upon the power of the state to levy a tax upon interstate commerce. The question is one of fact, namely, is the company engaged in interstate commerce only? Such a license fee is payable once, and the company might well have paid it rather than engaged in controversy in regard to its right to construct, operate and maintain the pipe line.

Second. In the case of Norfolk & Western R. R. Co. v. Pennsylvania, above cited, the Norfolk & Western Railroad Company had obtained a license to maintain an office in the state. The Court comments upon this fact and says:

> "That office was maintained because of the necessities of the interstate business of the company and for no other purpose."

Now it might be that the Norfolk & Western Railroad Company did an unnecessary thing in obtaining from the Secretary of the Commonwealth a certificate enabling it to maintain its office in the state, but that is immaterial. This case, therefore, is, among other things, authority for the proposition that the mere fact that a company has complied with the state law in obtaining a certificate enabling it to maintain an office in the state does not indicate that it is doing an intrastate business subject to taxation.

Third. Pipe line companies in Missouri have the right of eminent domain (Section 1791, Revised Statutes of Missouri 1919), and under the decision of the Supreme Court of Missouri in Southern Illinois and Missouri Bridge Co. v. Stone, 174 Mo. 1, a foreign corporation which complies with the laws of Missouri applicable to foreign corporations will also have the right of eminent domain. The State of Missouri, of

course, clearly has the right to confer upon a corporation the right of eminent domain for the purpose of enabling it to engage in business as a common carrier engaged in interstate commerce only. The purpose here was to obtain for the Ozark Pipe Line Company the same rights as are conferred by the statutes of Missouri upon domestic corporations of like character.

If the Ozark Pipe Line Corporation were a Missouri corporation it would not be subject to a tax upon interstate commerce. This is clear from the above decisions denying to the state the power to tax the business of interstate commerce. (See, also, Philadelphia and Southern Mail Steamship Company v. Penn., 122 U. S. 326 [cited infra]). The mere fact, therefore, that the company desired to obtain for itself the powers conferred by the Missouri statute by no means indicates that it desired to do any other business than that of interstate commerce.

The filing of the charter of the company with the Secretary of State and the obtaining of a certificate from the Secretary of State in order to be clothed with powers granted by the statutes of Missouri are all in furtherance of the company's interstate business. The company is now clothed with the power of eminent domain, a power which it has obtained in furtherance of its general business enterprise, which is essentially interstate commerce.

V.

No State May Levy a Franchise or Excise Tax Upon a Company Doing Solely an Interstate Business In, Through or Across the State.

That the transportation of oil from one state to another is interstate commerce there can be no question.

> Eureka Pipe Line Company v. Hallanan, 257 U. S. 265, 42 Sup. Ct. Rep. 101;
> United Fuel Gas Co. v. Hallanan, 257 U. S. 277, 42 Sup. Ct. Rep. 105.

That this tax is a license privilege or excise tax has been settled by the Supreme Court of Missouri in the case above cited.

> Marquette Hotel Investment Company v. State Tax Commission, 282 Mo. 213, l. c. 234, 221 S. W. 721.

"A franchise tax is not one levied upon property, but one placed on the right to do business."

This tax is not a mere license for the privilege of maintaining an office in Missouri. Even such a tax would be invalid.

> Pembina Consolidated Mining & Milling Co. v. Pennsylvania, 125 U. S. 181.

But this tax is much more than that. It is a tax upon the privilege of doing business within the state. That such a tax cannot be levied where the business done is wholly interstate is well settled.

In the case of Kansas City, Ft. Scott & Memphis Ry. Co. v. Bottkin, 240 U. S. 227, we find the following:

> "A state cannot lay a tax on interstate commerce in any form, by imposing it either upon the business which constitutes such commerce, or the privilege of engaging in it, or upon the receipts as such derived from it."

In the case of Le Loup v. Port of Mobile, 127 U. S. 640, the Court says (l. c. 648):

> "In our opinion such a construction of the Constitution leads to the conclusion that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary." (Numerous cases are then cited.)

In the case of Philadelphia & Southern Mail Steamship Company v. Pennsylvania, 122 U. S. 326, this

Court was considering a tax levied upon the gross receipts of the steamship company, which was engaged in interstate and foreign commerce. The tax was levied by the home state of the corporation under whose laws it was incorporated. It was ruled that the tax was invalid. The opinion of the Court considers the nature of the tax there in question. The Court says (l. c. 342):

> "It certainly could not have been intended as a tax on the corporate franchise because by the terms of the act it was laid equally on the corporations of other states doing business in Pennsylvania. If intended as a tax on the franchise of doing business, which in this case is the business of transportation in carrying on interstate and foreign commerce, it would clearly be unconstitutional. It was held by this Court in the case of Gloucester Ferry Company v. Pennsylvania, 114 U. S. 196, that interstate commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals. In that case the tax was laid upon the capital stock of a ferry company incorporated by New Jersey and engaged in the business of transporting passengers and freight between Camden in New Jersey and the City of Philadelphia."

The Court then further comments upon the deci-

sion in the Gloucester Ferry Company case and adds (l. c. 344):

> "It is hardly necessary to add that the tax on the capital stock of the New Jersey company in that case was decided to be unconstitutional because as the corporation was a foreign one the tax could only be construed as a tax on the privilege or franchise of carrying on its business and that business was interstate commerce.
>
> "The decision in this case and the reasoning on which it is founded, so far as they relate to the taxation of interstate commerce carried on by corporations, apply equally to domestic and foreign corporations. No doubt the capital stock of the former, regarded as inhabitants of the state, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce so as to make the tax in effect a tax on such commerce, **but their business as carriers in foreign or interstate commerce cannot be taxed by the state under the plea that they are exercising a franchise.**"

VI.

Even Where a Company Does an Intrastate Business, Though Such Business Is Taxable, Nevertheless, if the Law Is so Framed as to Include or Compel Payment of a Tax on Interstate Commerce Also, It Will Be Void.

In what is said above we have confined ourselves to the citation of cases in which the company taxed was,

like the Ozark Pipe Line Company, doing nothing but an interstate business. Most of the decided cases, however, deal with companies doing both an interstate and an intrastate business. In such case the state has the power to tax the intrastate business. But even in such case where the tax is so levied as to include, or compel payment of, a tax upon the interstate business it will be void.

Oklahoma v. Wells-Fargo & Co., 223 U. S. 298;
Pullman Company v. Kansas, 216 U. S. 56;
Western Union Telegraph Co. v. Kansas, 216 U. S. 1;
International Paper Company v. Massachusetts, 246 U. S. 135;
Crew Leavick Co. v. Pennsylvania, 245 U. S. 292;
Looney v. Crane Co., 245 U. S. 178;
Ludwig v. Western Union Telegraph Co., 216 U. S. 146;
Locomobile Co. of America v. Massachusetts, 246 U. S. 146.

VII.

We are not here considering a tax which, though in form a privilege tax, is, in substance and effect, a general property tax; nor are we considering the form or method which a privilege tax upon intrastate business may lawfully assume.

The defendants below cited several cases to the Court which we think are clearly distinguishable.

As those cases will probably also be cited here, we desire briefly to comment upon some of them. In several cases so cited the Court was confronted with a tax which was levied upon a right of way, or which was, though in form a license tax, actually assessed in lieu of a tax upon the right of way.

For example, in Postal Telegraph Cable Company v. Adams, 155 U. S. 688, it was held that a state privilege tax of a certain amount per mile of wires operated within the state, imposed on all telegraph companies therein operating, in lieu of all other state, county and municipal taxes, and amounting to less than the ordinary ad valorem tax, is substantially a mere tax on property, to which a foreign corporation operating within the state is subject, notwithstanding it is engaged in interstate commerce.

The distinction between a privilege or excise tax and a tax upon property is vital. The state can levy a tax upon all property within its borders whether that property is used in interstate commerce or not. The state may tax such property directly or may resort to other methods and tax the company on a mileage basis. If the tax is in substance and effect a property tax it will be sustained, provided, of course, it is fair and reasonable and is not so figured as to violate any fundamental property rights.

Here we are not concerned with this question. The State of Missouri, as stated above, does levy and col-

lect a tax upon the right of way of the Ozark Pipe Line Corporation, considered as property. The question here is, has it a right to levy a tax upon the privilege of doing the business which the Ozark Pipe Line Corporation does? Counsel cited the following language (l. c. 696):

> "But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

Now, it will be noticed that the Court says that in such a cas the exaction is so levied that it cannot exceed the sum which might be levied directly, that is, the method of figuring the tax is such that the company cannot suffer by reason of the fact that the tax is in the form of a privilege tax instead of in the form of a direct tax upon property. In

other words, it is in substance and fact a direct ad valorem tax upon property, and, as the company in that case, as stated by the Court, paid no other direct ad valorem tax upon its property, it could not complain on account of the form of the tax in question, unless it could show that the result was that a greater amount was levied than that which would have been levied if the tax had been a direct ad valorem tax. The cases, therefore, which consider a tax levied in lieu of an ad valorem property tax are not in point.

Another line of cases cited deals with franchise taxes levied on account of intrastate business where a company is engaged in both interstate and intrastate business. In these cases the amount of the tax may be arrived at in different ways according to the various provisions of the statutes, but the cases are equally not in point for the reason that there is no effort here to levy a privilege tax upon a company on account of any intrastate business, for the appellant does no such business.

For example, counsel cited Hump Hair Pin Manufacturing Company v. Emmerson, 258 U. S. 290, and quoted as follows (l. c. 294):

> "As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of

determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule."

The clause in parentheses is, of course, the controlling clause. The cases cited are simply concerned with the validity of various methods adopted by the states in ascertaining the value of intrastate business as compared with total business. Where it is conceded that the company does an intrastate business and that such business is taxable, the only question is as to the propriety of the method adopted in taxing it. In the present case, however, there is nothing for the state to levy a privilege or excise tax on, for there is no intrastate business done and the company does not have to obtain from Missouri the privilege of doing an interstate business, nor can it be taxed by the State of Missouri on such business.

Respectfully submitted,

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APPENDIX.

The following sections of the Revised Statutes of Missouri are referred to in the argument. We insert so much thereof as is material.

Sec. 9792. **Foreign Company to File Articles Where—Shall Contain What—Fee—Certificate, etc.**—Every company incorporated for the purpose of gain under the laws of any other state, territory or country, now or hereafter doing business within this state, shall file in the office of the Secretary of State a copy of its charter or articles of association, duly authenticated by the proper authority, together with a sworn statement under its corporate seal, particularly setting forth the business of the corporation which it is engaged in carrying on, or which it proposes to carry on in this state; and the principal officer or agent in Missouri shall make and forward to the Secretary of State, with the affidavits required, a statement sworn to of the proportion of the capital stock of said corporation which is represented by its property located and business transacted in Missouri, which statement shall set out the location of its principal office or place in this state for the transaction of its business, where legal service may be obtained upon it. Such corporation shall be required to pay into the state treasury upon the proportion of its capital stock represented by its property and business in Missouri, incorporating tax and fees equal to those required of similar corporations formed within and under the laws of this state, with an addition of ten dollars as a fee for issuing the license authorizing it to do business in this state. Upon compliance

with these provisions by the corporation the Secretary of State shall give a certificate that said corporation has duly complied with the law, and is authorized to engage only in the business set out in the statement filed with its charter. Said certificate shall state the entire amount of its capital; the proportion thereof which is represented in Missouri, and the business which it is authorized to carry on; and the location of its principal office or place of business in this state, and such certificate shall be taken by all courts in this state as evidence that said corporation is entitled to all the rights and benefits of the laws relating to foreign corporations for the time set forth in its original charter, unless this shall be for a greater length of time than is contemplated by the laws of this state, in which event the duration shall be reckoned from the date of its incorporation to the limit of time set out in the laws of this state. * * *

Sec. 1791. **Lands May be Condemned, When—Petition, etc.**—In case land or other property is sought to be appropriated by any road, railroad, telephone, telegraph or any electrical corporation organized for the manufacture or transmission of electric current for light, heat or power, or any oil, pipe line or gas corporation engaged in the business of transporting or carrying oil or gas by means of pipe lines laid underneath the surface of the ground, or other corporation, created under the laws of this state for public use, and such corporation and the owners cannot agree upon the proper compensation to be paid, or in case the owner is incapable of contracting, be unknown or be a nonresident of the state, such corporation may apply to the Circuit Court of the county

where said land or any part thereof lies, or the Judge thereof, in vacation, by petition, setting forth the general direction in which it is desired to construct their road, railroad, telephone or telegraph line or electrical line, oil, pipe line or gas line over or underneath the surface of such lands, a description of the real estate or other property which the company seeks to acquire, the names of the owners thereof, if known, or, if unknown, a pertinent description of the property whose owners are unknown, and praying the appointment of three disinterested freeholders, as commissioners, or by a jury, to assess the damages which such owners may severally sustain in consequence of the establishment, erection and maintenance of such road, railroad, telephone or telegraph line, or electrical line, oil, pipe line or gas line over or underneath the surface of such lands.